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Federal Procedure--What of the Court-Martial System--A Comparison with Civil Criminal Procedure

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FEDERAL PROCEDURE
WHAT OF THE COURT-MARTIAL SYSTEM
A COMPARISON WITH CIVIL CRIMINAL PROCEDURE

By JAMES BARCLAY SMITH*

THOSE endowed with the conceptual blessing of civil supremacy must be ever alert to maintain it. By the same token, a people charged, through the representative process, with the administration of a system which deals so intimately with so many of its members and with such important aspects of government as does our system of military justice must be ever vigilant to observe its operation to the purpose of its more efficient functioning, and the improvement of its methods and structure. This is a study in the performance of that purpose designed to disclose the relative merits of the military with the civil process as a modern system designed fairly to determine the truth. We feel a smug satisfaction of traditional inertia in the enlightened justice of the Federal civil courts. As a non-military people, we are suspicious of military justice because we are unfamiliar with it. That its faults may be less than the accepted standard of virtue does not justify them. It should give assurance and perspective to a design for improvement to observe them in parallel function. In approaching the problem of determining what is good and what improvements are called for in the system of military justice, it is necessary to observe, briefly at least, the function of prescribed conduct and the rules of its enforcement in terms of the theory of fundamental governmental principles; and to observe the progress, by comparative study, in parallel fields of endeavor. In this study, general patterns of movements in the civil jurisdiction, particularly the federal, are examined in outline with the purpose of disclosing infirmities which have received attention, and the treatments proposed. These disclose conditions which may have analogy in the military or provide the suggestion for improvement of the military. The best thought and study that have been devoted to related machinery and procedural methods in the civil jurisdiction have been examined. The youth movements are set out at some length because many soldiers are less than twenty-five years of age, and because the alerted attention to the young

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offender and his case may provide the source of analogous application in ameliorating the conditions which produce the crime, or occasion recidivism. Immediately considered is the theory of criminal procedural rules which, through failure to keep the need of change abreast of the change of needs, produces a corroding lag in the public administration of the law of crimes which touches intimately both the individual and the body politic he composes. No man of imagination can fail to see that the law springs palpably out of the very roots of life, and moves, or should move, as life moves. As life is more important than anything that can be said about it, so the law grows out of life, and is molded and being constantly remolded to serve the people from whose being it springs. The final objective is complete ideation of the most wholesome principles applicable to the institutions involved in the system of military justice.[1]

GENERAL

Under a political theory as that expressed, for example, by the Stuarts in which the executive was the State and the people existed to serve him as such, the purpose of the expression of procedure in relation to crimes was necessarily very different than that which arises under a popular, representative, republican system of government. Under the yoke of such a tyranny as the former, the prosecution of the individual may well have seemed to some degree to the popular mind as persecution. The lawyers, and in turn the judges, began to reflect the public opinion long before the same was true of the executive government. The harshness of the laws of crimes and the brutality of the punishment for their violation were moderated in administration wherever the administrator expressed a popular or intimate relationship with those governed. This produced several parallel patterns which continue to cause us no little concern. One was the insistence upon a meticulous proof of every detail of fact. Another, and preceding the proof, was that every possible allegation under the law and of the facts must be set out in extenso. In their achievement, the prosecutor represented the King. The insistence upon detail of pleading necessarily raised the opportunity to defeat the King's persecution. It thus may be said that the purpose, and a legitimate purpose, of legal technicalities was to bring the law and its administration into closer touch with those to whom it was applied. Closer, because the public interest was bet-

[1]Realistically, it should be borne in mind that system articulates statutes of the United States. 41 Stat. 787, 10 U. S. C. 1471.

ter served by the defeat of the legislative purpose than its achievement. The justification for the invention of judicial devices which produced tautological pleadings, defeatable by the slightest formal defect, should not be carried over to an age when the repetition produces the opposite effect.

There has been a strong public reaction to the continuation of old procedures which have lost their virtue to protect the oppressed, and have in turn, through the growth of organized, syndicated crime, licensed the professional criminal, under the championship of astute counsel, to prey upon society. The metamorphosis lies in the transition from an omniscient, greedy, tyrannous, hostile government exercising a *right* to be served, to our present representative, republican system of government created by and for the people to whom it owes the duty to operate amelioratively in the performances of its functions. The legislative purpose has become the popular will, and the use of "tricks" to defeat it raises the public indignation.

Reference has been made to the position of the public prosecutor. With us, he remains with the executive and not with the judicial branch of the government, but the executive has been reduced from the role of master to the dignity of public servant. The executive function is thus to carry out the legislative or popular will in presenting charges of criminal misconduct to an impartial judiciary. We have long since changed our fundamental political bases, but we failed to correlate the machinery of justice to the different grist.[2]

The first, and perhaps most serious, consequence of the maladjustment lies in the general loss of confidence and respect for the bench (courts) and the bar. Another, of more recent origin, finds source in the public realization that artful distortion of rules designed to protect their homes was about to destroy them. Technical defenses and safeguards, even written into the Bill of Rights, were licensing the criminal. The insistence now, increasingly, is upon prosecution, because we no longer need fear the source and purpose of the definition of the crime. Objectively descriptive of this reaction is the program of the Attorney General of the United States of criminal law enforcement. This led to the development of the Federal Bureau of Investigation. Across the country, public discussion focused upon the establishment of State departments of justice upon the federal pattern. Associated with the activity of the

[2]*Cf.* J. B. Smith, *Does Proof of an Irresistible Impulse Establish the Defense of Insanity?* (1945) 31 Va. L. Rev. 865.

federal government and the interest of the States, the Commissioners of Uniform Laws and the American Bar Association recommended the adoption of the hot pursuit, and interstate rendition laws. Cooperation between state and federal law enforcement agencies became factual. The increased emphasis upon prosecution did not raise a thirst for blood but for fairness. A fairness to the accused, and to society. To assure the former, the outstanding step was the movement to establish a public office on equal footing of skill and experience with that of the prosecutor to assure to the accused an equality of dexterity and zeal in the conduct of his trial, and the solution of such niceties as the procedure might present. The balance of the public interest begins to find a new fulcrum in the public conscience upon the realization that an enlightened system of justice should likely result in the conviction of the wrongdoer, and the acquittal of those falsely charged with misconduct. Society is protected only when both are expectable. Unless the individual may establish his innocence, there is no personal security from tyranny today any more than from a Stuart. Unless the judicial process is freed from justice-defeating technicalities which license the wrongdoer's predaceous practice, there is no more public security than in the days of the barbarian.

We are immediately confronted with the inherent, chronic error of law of crimes and its administration that there is some tag and run test of the identity of a rascal, and that identity by trial and mechanical formula of disposition are all that is involved. The interest of society is not primarily served by the sport netting, but in assuring the unlikelihood of the growth of the subject for the prosecutor's net. To whatever extent it fails of the first, it must act in the second. Because conviction follows, it does not mean that a man has been lost to society and to himself, as an enemy and a public charge. He may yet be salvaged and restored to usefulness. In transition from a purely retributive system, increasing study and attention must constantly be given to matters of prevention, probation, incarceration, clinical and personality study, and after care. This is so because all are involved in the broader pattern of a system of justice. Close to the letter of the crime itself are the pre-trial practices involving detection, arrest, confinement, investigation, charges, and reference to trial; the trial, involving the prosecution, the defense, the procedure, and the composition, conduct, and competency of the court; and the post-trial conduct from the sentence to final execution and discharge from further surveillance.

To observe the strength and weakness of military justice, com-

parative study must be made of the progress in other systems under our own government and those of other nations. An ever present factor in the military, however, is the element of time associated with the particular or general occasion, and the immediate public purpose of sustaining a discipline in an army efficient enough to promptly destroy the strongest and meanest enemy. This frequently involves summary jurisdiction founded upon physical contact.

General Changes in the Military System

While it lends no virtue to the military to point to the anachronisms of other systems, it is proper to note the general condition as it discloses the alertness and progress of the former by comparison. In 1905, William Howard Taft made the following statement:

"I grieve for my country to say that the administration of criminal law in all the states in the union is a disgrace to our civilization. We are now reaching the age when we cannot plead youth, sparse civilization or newness of country, as a cause for laxity in the enforcement of law."

The counsel of even the great jurist and statesman was not heeded, and no constructive action was taken with any body of American laws of crime. In 1935, Dean Pound of the Harvard Law School was saying to the American Bar Association: "I assume that an overhauling of the substantive criminal law must be a large part of a far-reaching program of improvement of punitive justice seeking enduring results. But if the results are to be enduring, the overhauling must be intelligent, thorough-going, and consistent. Patchwork tinkering of Criminal Codes at every session of the Legislature has long been the bane of criminal law. Long and critical preparation must go before the overhauling." We still await for that to be done with any American civil code of crimes.

The military code of laws, both substantive and procedural, has been given greater attention. The Second Continental Congress, in 1775, took sixty-nine articles bodily from the British Code of 1774, and supplemented them by adding sixteen more. This code was replaced by the Code of 1776 which was a rearrangement and enlargement with some modifications. In 1806, the Code was modified so as to fit under the new Constitution. A restatement without formal revision of substantive matters was made in 1874. However, a complete revision was made in 1916 which eliminated obsolete matter, and made many substantial changes looking to a scientific and modern statement of the military law of crimes. The experience

of the World War called forth study of the Articles of War by the Congress, and the Code of 1920 resulted. While most of the numbering and largely the substance of the articles defining crimes in the Code of 1916 were retained, it was, nevertheless, the intention of the Congress to revise and republish the code. The 1920 Code did this by material changes in the substantive law, where occasion called, and wide changes in the procedural law so that the action of the Congress properly may be called an overhauling and not merely a tinkering.[3]

[3]On 1 January 1921, The Judge Advocate General of the Army published the following statement.

REVISION OF THE ARTICLES OF WAR

During the early part of the year 1919 several proposed revisions of the Articles of War were introduced in both Houses of the Sixty-fifth Congress, third session, and referred to the Military Affairs Committees of the Senate and the House of Representatives, respectively, and during the month of February, 1919, hearings were held by the Senate Committee on Military Affairs upon a bill providing for amendments to the Articles of War, which had been introduced in the Senate by the chairman of that committee. However, no bill was reported to either the Senate or the House of Representatives during that session of the Congress.

Beginning early in the year 1919, careful consideration and study was given to the whole system of court-martial procedure, with a view to its revision and improvement in the light of experiences of the war. This consideration and study was carried on by the War Department through the special War Department board on "Courts-Martial and Their Procedure," composed of Maj. Gen. Francis J. Kerman, U. S. Army, Maj. Gen. John F. O'Ryan, New York National Guard, and Lieut. Col. Hugh W. Ogden, Judge Advocate; by a committee of civilian lawyers appointed by the president of the American Bar Association; and by the Office of the Judge Advocate General, including a special study of the system of military justice in the British, French, and Belgian Armies by an officer detailed for that purpose. Through the courtesy of the various Governments, statistical and other information relating to the experiences of those armies in administering military justice during the war were thus placed at the disposal of the Judge Advocate General's Office. Particular acknowledgement is due to Sir Felix Cassel, Judge Advocate General of the British Forces; to M. Edouard Ignace, French Undersecretary of State for Military Justice; and to Gen. Baron van Zuylen van Nyevelt, Auditeur General of the Belgian Army.

The first session of the Sixty-sixth Congress began on May 19, 1919, and several proposed revisions of the Articles of War were introduced in both Houses of the Congress at that session, and referred to the Military Affairs Committees of the Senate and House of Representatives, respectively.

A subcommittee of the Senate Committee on Military Affairs held very extensive hearings on one of the bills, and went into the subject very fully. Besides the views of a large number of well-informed witnesses, there were presented, for the consideration of the subcommittee, the results of the studies referred to above.

At the conclusion of those hearings, upon the invitation of the subcommittee of the Senate Committee on Military Affairs, a bill providing for a revision of the Articles of War was prepared and submitted to the subcommittee by the Judge Advocate General.

That revision, with few changes, was adopted by both the subcommittee and the full Committee on Military Affairs of the Senate, and by the Committee on Military Affairs of the House of Representatives; was favorably reported to both Houses of the Congress by those committees; and subse-

No legislature, including the Congress, has made any similar effort with any civil code of laws of crime over the same period. The rather startling thing is that every proposed change of material

quently was enacted into law as Chapter II of the Army Reorganization Act of June 4, 1920 (41 Stat. 787).

The salient features of the revision are as follows:

1. Enlisted men are placed on a parity with officers in respect of the right to prefer charges against persons in the military service; but all charges must be verified by affidavit. (A. W. 70.)

2. The preliminary investigation of charges is made more strict than in the former code; particularly by the new requirement that, at the preliminary investigation, full opportunity shall be given to the accused to cross-examine witnesses who appear against him, if they are available. (A. W. 70.)

3. The present regulation (C. M. C. M. No. 5, July 14, 1919, par. 76a), which requires that, before directing the trial of a case by general court-martial, the convening authority shall refer the charges presented to his staff judge advocate for consideration and advice, is made mandatory by statute. (A. W. 70, par. 3.)

4. Unnecessary delay on the part of an officer in investigating charges or carrying a case to a final conclusion is made an offense punishable by trial by court-martial. (A. W. 70.)

5. Resort to arrest instead of confinement pending trial in the cases of enlisted men charged with minor offenses is prescribed instead of merely being authorized. This places enlisted men upon the same footing as officers in respect of such offenses. (A. W. 69.)

6. Resort to the power of commanding officers to administer disciplinary punishment under the one hundred and fourth article of war in preference to resort to courts-martial, is encouraged.

7. The appointment by the convening authority of defense counsel, and one or more assistants, in the same manner in which trial judge advocates and their assistants are appointed, is made mandatory by statute. This places the defense upon the same footing as the prosecution before the court, but does not prevent the man tried from being represented by his own counsel, if he so desires. (A. W. 11, 17.)

8. A "law member" is provided for every general court-martial (A. W. 8, par. 2), with power to rule upon all interlocutory questions, except challenges, subject (except as to rulings on the admissibility of evidence) to an appeal to the court itself. (A. W. 31.)

9. The requirement (which heretofore has existed by regulation) that every record of trial by a general court-martial or military commission shall be referred to a staff judge advocate or to the Judge Advocate General for advice before action thereon by the reviewing or confirming authority, is made mandatory by statute. (A. W. 46.)

10. The words, "in time of peace," are eliminated from the forty-fifth article of war, thus enabling the President to fix the maximum limits of punishment in time of war, as well as in time of peace.

11. The prohibition (which heretofore has existed by regulation), against *(a)*, the reconsideration by a court, at proceedings in revision, of an acquittal; a finding of not guilty of any specification; or a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; and *(b)*, the adjudication by a court, at proceedings in revision, of a sentence more severe than that previously adjudged by it (unless the sentence previously adjudged was less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction was had), is made mandatory by statute. (A. W. 40.)

12. Provision is made for a new trial in proper cases. (A. W. 40, 47, 49, 50½.)

13. A unanimous vote of the members of the court for death sentences,

content in either the procedural or substantive field has been preceded by the military in the field of simplified improvement. While these will receive further consideration, there may be noted here

a vote of three-fourths of the members of the court for sentences involving confinement for life or for more than 10 years, and a vote of two-thirds of the members of the court for all other sentences, is required. (A. W. 43.)

14. Provision is made for a system of appellate review for all general court-martial cases. (A. W. 50½.)

15. Provision is made for greater flexibility in the suspension of sentences. (A. W. 52.)

Other changes in the interest of better administration and greater flexibility which may be mentioned are: An amendment to Articles of War 5 and 6, removing the maximum limit as to the number of members for general and special courts-martial; a change in Article of War 18 which allows each side one peremptory challenge (the law member of the court not being subject to challenge, except for cause); and a change in nomenclature from "judge advocate" to "trial judge advocate," to avoid possible confusion with the staff judge advocate.

With the exception of Articles 2, 23, and 45, which took effect on June 4, 1920, the date on which the act was approved, the revision will go into effect on February 4, 1921. The provisions of the act which have already become effective are as follows:

Article 2, "Persons subject to military law," is amended so as to include members of the Army Nurse Corps, warrant officers, Army field clerks, and field clerks Quartermaster Corps.

Article 23, "Refusal to appear and testify," is amended so as to provide that every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the act of March 4, 1909 (35 Stat. 1088—commonly known as the Federal Penal Code), or any amendment thereof, shall be punished as provided therein.

Article 45, "Maximum limits" (of punishment), is amended so as to enable the President to prescribe the maximum limits of punishment for trials by courts-martial in time of war, as well as in time of peace.

The present revision of the Manual for Courts-Martial has been prepared primarily to conform the manual to the changes in the Articles of War accomplished by the act of June 4, 1920, and to embody the results of decisions made by the Office of the Judge Advocate General and the War Department, and such other changes in the regulations for the government of courts-martial and courts of inquiry as have been approved by experience. The aim is to adhere to the principle observed in drafting the present revision of the Articles of War, viz, to make changes dictated by experience, while at the same time holding fast to ancient principles that have proven their value.

The salient changes in the Manual, besides those required to conform to the new Articles of War, are:

(a) Paragraph 219, procedure in cases of insanity, has been entirely rewritten.

(b) Depositions may be taken on oral, as well as upon written, interrogatories.

(c) The chapter on evidence has been rewritten.

(d) More definite provisions have been made concerning the curative effect of the thirty-seventh article of war.

(e) With a view to reducing the number of court-martial trials, greater stress is laid upon the disciplinary powers of organization commanders; and

(f) The appendices have been, in large measure, rewritten, and some new ones added, e. g., Appendix 9, forms for use of the president and the law member of courts-martial.

such matters as arrest and bail, pre-trial investigation, the information, technical pleas, trial procedure, the public defender, summary jurisdiction, functions of the court, non-unanimous verdicts,[4] automatic corrective appellate process, rehabilitation, and clemency.

REFORMS

I

In terms of the force carried by the great weight of its prestige, perhaps the most important movement for improvement in the laws dealing with crimes is the recommendation of the American Law Institute's Advisory Committee on Criminal Justice for the production of a Model Code of Criminal Law. The code contemplated would embody "not only the rules of substantive law and procedure, but also the organization and administration of courts and other agencies for the prevention, detection and prosecution of crime and delinquency." It insisted that "the Institute should endeavor to create a code more nearly suited to modern social and economic conditions," with the protection of society as its basic aim. This language demonstrates not a public concern in convictions, but an aroused public resentment in the impotency of legal machinery to gear itself to the organized criminal. The same sentiment was expressed in the movement known as the United States Attorney General's law enforcement program. The striking aspect of the latter is that an energetic effort to perform oath-bound duty should carry so marked an element of novelty and notoriety about it. But even more astounding is the fact that these many stimuli have not found themselves expressed in any overhauled code of the substantive law of crimes.

Tinkering provided some aid in the war against gangsters and racketeers. "War" not prosecution came to be a vernacular expression, as well it might, when the ordered forces for the protection of society were opposed by such a show of force as to terrorize whole communities. Some legislatures took the surprise out of the alibi defense by notice thereof in advance of trial. All efforts to allow the trier of facts to draw an adverse inference from the accused's failure to take the stand in his own behalf failed.[5] The rule developed as a matter of fairness to the accused at a time when he was disqualified from testifying in his own behalf.[6] It has no foundation when the stand is his for the asking.

[4] 10 U. S. C. 1514.
[5] *Id.*, 1945.
[6] See (1929) Rice v. United States, 35 Fed. 2nd 689; (1932) Brown v. U. S., 56 Fed. 2nd 997.

In the field of detection, the pattern of the Federal Bureau of Investigation is receiving much following in state-wide local organizations of some skill and capacity for sustained effort. More effective prosecution has resulted from adoption of the plan of the federal Department of Justice.

The movement started by the United States Attorney General found head in what was popularly known as the Crime Conference in Washington in December, 1934. His plan was directed to three phases, simply put, of prevention, apprehension, and correction. His purpose was to create, in the Department of Justice, a new Bureau of Crime Prevention, and to expand the functions of the Bureau of Investigation and the Bureau of Prisons. Tracking down the established criminal was one thing but stopping the source or manufacture of criminals from the advanced teen-age group, which was disclosed as the principal feeder, had acquired an indisputable importance.[7]

II

The trend of legislation related to crimes under civil authority can be shown by a brief outline of the federal jurisdiction. The early supposition that the exercise of criminal jurisdiction in common law cases was within the implied powers granted to the federal courts was repudiated; and it became definitely established in order for a federal court to take jurisdiction it was necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense although it has been declared proper for the courts to look to the common law for definitions both of crimes and of terms used in the criminal law. The Constitution does not specifically outline the field of federal criminal law jurisdiction. Except for a few express specifications such as those providing for the punishing of treason, piracies, counterfeiting, and for suppressing insurrections, we must look to other grants of power—such as "regulating the territory or other property belonging to the United States," levying taxes, establishing post-roads and post-offices, and regulating foreign and interstate commerce, and work out, in connection therewith, implied power to use the criminal law as one agency for accomplishing these results. The law governing piracies and offenses on the high seas developed almost entirely prior to 1850; the laws relating to the slave trade and peonage were passed during two periods, the first prior to 1825, and the second during

[7]This, in turn, is the source of two later movements subsequently to be noted.

the period of the Civil War and reconstruction; the laws defining offenses against the postal system came mostly during the quarter of a century from 1850 to 1875, with occasional additions from time to time since then; the use of the commerce clause as a basis for criminal law was apparently unthought of prior to 1850, and received its main development between 1900 and 1915 with a recent resurgence; offenses against neutrality made their appearance in the federal law during the period immediately after the war of 1812, and again in the World War period. More recent changes have borne close resemblance to earlier decades, and represent logical developments to meet new conditions. The recent bank robbery act follows through the act of 1863 making it a crime to steal the personal property of the United States, the law of 1867 making it a crime to injure mail bags, to steal post-office property, to break and enter a post-office, or to injure letter boxes. The recently enacted law making it a federal crime to kill a federal officer has its counterpart in the law of 1790 making it a crime to obstruct process or assault an officer, and the law of 1872 making it a federal offense to assault, wound, or rob a custodian of the mail. The National Stolen Property Act of 1934 is the logical development of the series of laws which provide penalties for transportation in interstate commerce of articles which, for one reason or another, have acquired an illegal character; for example, the lottery ticket act of 1895, obscene books in 1897, poached wild game of 1900, prize fight films of 1912, stolen motor vehicles of 1919, and of kidnapped persons of 1932. These were supplemented by laws making it a crime to conspire to transport kidnapped persons or stolen cattle, and the sending of threatening communications in interstate commerce. The law prohibiting the aiding of escapes from federal penitentiaries or causing mutinies therein or introducing dangerous instrumentalities into federal penitentiaries, the Federal Bank Robbery Act, the Train Wrecking Act, and the Federal Anti-racketeering Act provide examples of laws enacted upon the public reaction to recently occurring events or outstanding criminal episodes. To close the gap between state and federal action, Congress extended the state crimes of 1933 to include federal enclaves, and supplemented this with the extension of federal criminal jurisdiction to any land under the concurrent jurisdiction of the United States. This is the reason for the federal act making it a crime to flee from one state to another for the purpose of avoiding prosecution or the giving of testimony in felony cases.

III

The procedural side of the federal penal system is characterized, by the 1937 Annual Report of the Attorney General, "Delay in the administration of Justice is still the outstanding defect of our Federal Judicial System."[8]

[8]He noted the principal types of delay as follows: "First—the gap between the date of filing the suit and the time the case is in shape for trial, i.e., the date on which issue is joined by the filing of the final pleading. This period is protracted beyond all reason in almost every jurisdiction. It is the stage characterized by dilatory pleas, motions to dismiss, demurrers, and other technical proceedings. In many districts this defect is accentuated because matters of this kind are heard only once a month and sometimes only on the first day of the term. In places, and there are many, in which only one or two terms of court are heard annually, the filing of a dilatory plea, a motion to dismiss or a demurrer may result in a postponement of the trial for at least six months or perhaps a year. Second—delay arises because of the time elapsing between joinder of issue (the date on which the final pleading is filed) and the earliest date on which the case can be reached for trial in due course, even if no attempt to postpone is made by any of the parties thereto. Even when measured by this standard in 17 districts the trial dockets are in arrears. In three of them (the District of Columbia, the Eastern District of Michigan, and the Western District of Washington), the congestion is so severe that the time lag is between 1 and 2 years. This computation, of course, does not include the time consumed in the preliminary stages of the case prior to joinder of issue. We must not be misled by the statement that in the other districts the trial dockets are said to be current. All that this means is that after the final pleading is filed in any case, the trial may be had at the next ensuing term of course, if the parties and the court cooperate. It does not follow, therefore, that in such districts the business is actually current in any true sense, for the word (current) does not take into account the time consumed during the preliminary period before the case is in shape for trial or the time lost between the time when a case may theoretically be tried and the time when it is actually tried; nor does it make any allowance for the fact that in many divisions and at many places of holding court, terms are convened but once or twice a year. The interval elapsing between terms of court may alone account for a delay as of much as a year between the time the case is in shape for trial and the earliest date upon which it can actually be heard. That this is an important factor may be deduced from the fact that sessions of the United States District Courts are held at 376 different places. At 115 of these places there is only one term a year, while at 242 of them there are only two terms annually. At only 19 places are there more than two terms a year. Ingenious counsel are frequently able to postpone actual trial despite the utmost efforts of adversary parties to bring the matter to a hearing. Overworked judges are at a disadvantage in their efforts to drive forward the business of the courts. The existence of actual delay even in districts where the trial dockets are reported to be in a so-called current condition is exclusively demonstrated by the large number of pending cases that were filed more than two years ago, and are still undisposed of. For example, in New Jersey and in the Western District of Wisconsin over 60 percent of the pending cases are more than two years old, while in the Northern District of Indiana and in the Southern District of Illinois this is true in 59 percent of the pending cases. In Delaware this is true of over 46 percent of the cases; in Vermont of over 42 percent; in the Western District of Missouri of over 39 percent; in Kansas of over 37 percent. Yet, in all these districts the trial dockets are reported as being in a so-called current state. Third—delay arises out of intervals frequently elapsing between the final submission of a matter for judicial decision and the date upon which a decision is rendered. Some of

The above report states that the situation, as depicted, is manifestly inconsistent with any sound idea of judicial efficiency, and that it will remain so until we correct the conditions which caused it. The defects are said to be due to an insufficient personnel, a tolerance of technicalities, a lack of a united, simple and coherent system of procedure, and lack of efficient administrative methods. The first could be relieved by the creation of more judgeships, the second by an improved code of procedure; and the third by the creation of an administrative officer to correlate the business of the courts under the Supreme Court of the United States.

IV

When we examine the source of the rules of procedure in criminal cases in the federal courts, the reason for some of the delays above described is apparent.

The Conformity Act of 1872, which requires the federal courts to conform to the state practice in actions at law, does not apply to criminal proceedings. The latter were governed by Section 722 of the Revised Statutes.[9]

Thus the federal criminal procedure was governed by a strange admixture of various federal statutes, the rules of common law, and in some isolated matters by state statutes. Where statutes deal with a specific matter of criminal pleading, practice, and procedure the difficulty is not so great. The subjects covered by the statutes, which are not numerous, include the requirement that at least twelve grand jurors must concur in finding an indictment;[10] a provision permitting several counts in one indictment "which may be

the judges have called attention to this unfortunate situation and have asserted that the volume of business confronting them is so great that the time during which they are not actually sitting on the bench is so limited that they do not have adequate opportunity to study the cases or prepare their decisions."

[9]U. S. Code, Title 28, Sec. 729, which reads as follows:

"The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and the Title 'Civil Rights,' and the Title 'Crimes,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law as modified and charged by the constitution and statutes of the States wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty."

[10]U. S. Code, Title 18, Sec. 554.

properly joined";[11] the contents of an indictment for perjury;[12] effect of judgment on demurrer;[13] the requirement that in capital offenses a copy of the indictment and a list of the jurors and witnesses be furnished to the defendant at least two days before the trial;[14] hearings before committing magistrates;[15] removal proceedings[16] and search warrants.[17] However, the great majority of matters bearing on criminal procedure were not covered by any federal statute. In this situation the common law must be looked to, that is the common law as modified by state constitutions and state legislation. Even if the trail through the forest of modifications were a clear one, still the federal courts would not be free of the entanglement of ancient common law procedure. Of the situation, Mr. Justice Clifford said in *Tennessee v. Davis*:[18]

"Examined in the most favorable light, the provision is a mere jumble of Federal law, common law, and State law, consisting of incongruous and irreconcilable regulations, which in legal effect amounts to no more than a direction to a judge sitting in such a criminal trial to conduct the same as well as he can, in view of the three systems of criminal jurisprudence, without any suggestion whatever as to what he shall do in such an extraordinary emergency if he should meet a question not regulated by anyone of the three systems."

The Congress, from the first, has given the head of the civil courts, the Supreme Court of the United States, rule making power in admiralty and equity, and has added, long since, bankruptcy, and copyright matters. Specific authorization was made for the Court to provide and promulgate the Rules of Civil Procedure for the District Courts of the United States which became effective in September, 1928. In 1934, the Supreme Court, pursuant to an act of Congress, promulgated rules prescribing practice and procedure with respect to proceedings in criminal cases after verdict. By like authority the Court has been engaged in the drafting of rules of criminal procedure prior to verdict which will become effective three months after the termination of the present session of the Congress. It will thus be seen that the recommendations of the Attorney General, set out above, are being acted upon in part by the appointment of more judges, by the preparation of a

[11] *Id.* Sec. 557.
[12] *Id.* Sec. 558.
[13] *Id.* Sec. 561.
[14] *Id.* Sec. 562.
[15] *Id.* Secs. 591 and 595.
[16] *Id.* Sec. 591.
[17] *Id.* Secs. 610 and 632.
[18] (1879) 100 U. S. 257, 299, 25 L. Ed. 648, speaking of R. S. 722.

comprehensive code of criminal procedure (yet to be effected); and in the creation of the Administrator for the federal judiciary directly under the Supreme Court of the United States. It should be noted also, in this connection, that the rules of evidence suffered from the same dry-rot as the rules of procedure. Upon the relation of *Funk v. United States* [19] and *Wolfle v. United States,*[20] Rule 26 of the pending Federal Rules of Criminal Procedure now provides that the "admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[21] Much of the credit for a major part of the success of the suggestions which have resulted in plans to prepare codes of criminal procedure must be given to the widely approved result of the American Law Institute's studies, and in its model code completed in 1930.

V

Out of the efforts of the American Law Institute, and the plan to revise the substantive law of crimes into an intelligent modern code, announced in 1933, have come other developments. The Institute released its model act "The Youth Correction Authority Act" in May, 1940. This program has received widespread approval by action in New York, Rhode Island, Virginia, Massachusetts, and many other states. The Model Act has been adopted almost in toto in California. An idea for the correctional treatment of youthful offenders emerged from the work of the Delinquency Committee of the Boy's Bureau of the Community Service Society in New York. Early in 1938, it made public a report on youthful offenders and the criminal justice system. The report was published by the Macmillan Company under the title, "Youth In The Toils." Two years later, the American Law Institute published its model Youth Correction Authority Act. The Conference of Senior United States Circuit Judges made an intensive study of the subject of punishment for crime. They first prepared a proposed act dealing primarily with the Youth problem. Another committee dealt with adult offenders. The two proposals were integrated into a single proposed act, the Federal Corrections Act, upon which the House

[19] (1933) 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 369.
[20] (1934) 291 U. S. 7, 54 S. Ct. 279, 78 L. Ed. 617.
[21] *Cf.* Swift v. Tyson, (1842) 16 Pet. 1, 10 L. Ed. 865, with Erie Railroad Co. v. Tompkins, (1938) 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, on substantive matters.

of Representatives Judiciary Committee began hearings on May 18, 1943.[22] The proposed act was divided into four titles. It contemplates a completely integrated correctional system under a Board of Corrections in the Department of Justice, composed of ten members appointed by the Attorney General. The Board is to comprise a Division on Adult Corrections, a Youth Authority Division, and a Policy Division. Members to serve on the Division of Adult Corrections and the Youth Authority Division are to be appointed by the chairman of the Board. The Director of the Bureau of Prisons, one member designated by the Division on Adult Corrections, and one member designated by the Youth Authority Division are to constitute the Policy Division which is empowered to lay down general treatment and correctional policies which the Director of the Bureau of Prisons in the administration of the penal and correctional system shall carry out. It also is empowered to lay down general policies with respect to parole and supervision during conditional release.

Title III deals with youthful offenders. Its underlying theory is to substitute for retributive punishment methods of training and treatment designed to correct and prevent anti-social tendencies. It departs from the merely primitive idea of dealing with criminals, and looks to the objective idea of rehabilitation. The act defines a youth offender as a male person under 24 years of age at the time of conviction. It defines "treatment" as corrective and preventive training and treatment designed to protect the public by correcting the anti-social tendencies of youth offenders. If the court finds that the youth offender does not need treatment, it may suspend the imposition or execution of sentence, and place the youth offender on probation. Thus, the power of the court to grant probation is left undisturbed. If the court finds that a convicted person is a youth offender, and the offense is punishable by imprisonment, it may, as a penalty for the offense and in lieu of the penalty otherwise provided by law, sentence the youth offender to the custody of the Youth Authority Division for treatment and supervision until discharged by the Authority as provided for. If the court finds that the youth offender will not derive benefit from treatment and should not be committed to the Youth Authority Division, it may sentence the youth offender under any other applicable penalty provision. Thus, the court in its discretion may, in the case of a youth offender, either grant probation, sentence to the Youth Authority Division, or sentence under other applicable law. If the youth offender is

[22]H. R. 2140, 78th Congress. See also H. R. 2139.

committed to the Youth Authority Division, he will be sent first to a classification center where a classification agency set up by the Director of the Bureau of Prisons will make a complete study of the youth offender, including a mental and physical examination, to ascertain his personal traits, his capacities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. In the absence of exceptional circumstances, this study will be completed within a period of thirty days. The classification agency will then forward to the Youth Authority Division a report of the findings with respect to the youth offender, and its recommendations as to his disposition. Upon receipt of such report and recommendation, the Youth Authority Division will make an order permitting the youth offender to remain at liberty conditionally under supervision, allocate and direct the transfer of the youth offender to an agency or institution for treatment, or order the youth offender confined under such conditions as it believes best designed for the protection of the public.

The Bureau of Prisons is required to designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for the treatment of youth offenders. Such institutions and agencies are to be used only for the treatment of youth offenders, in so far as that is practical, and youth offenders are to be segregated from adult offenders, and the classes of youth offenders are to be segregated according to the needs for treatment. The Youth Authority Division may at any time release conditionally, under supervision, a youth offender committed to it; and may discharge him unconditionally at the expiration of one year from the date of conditional release. It is required to release a youth offender conditionally, under supervision, on or before the expiration of four years from the date of his conviction, and to release him unconditionally on or before the expiration of six years from the date of his conviction. Youth offenders permitted to remain at liberty or conditionally released are to be under the supervision of the United States probation officers, supervisory agents appointed by the Chief Parole officer, and voluntary supervisory agents approved by the Chief Parole officer. The Board is authorized to encourage the formation of groups of voluntary supervisory agents. The powers and duties of voluntary supervisory agents are to be limited and defined by regulations adopted by the Board. The Bureau of Prisons is required to make periodic examinations of all youth offenders under treatment, and to report to the Authority as to

each youth offender at such intervals as the Youth Authority Division shall direct. Supervisory officials are also required to make like reports respecting youth offenders conditionally released under their supervision. Upon the unconditional discharge by the Youth Authority Division of a youth offender before the expiration of six years from the date of his conviction, the act provides that the sentences shall be automatically set aside and held for naught; and that the Youth Authority Division shall issue for the youth offender a certificate to that effect.

The most important features of the plan are integration of correctional measures under a single body, segregation of youth offenders from adult offenders and segregation of classes of youth offenders, power to develop variety of treatment facilities, flexibility of operations in adapting particular forms of treatment to individual youths in accordance with their favorable or unfavorable responses, adequate supervision during conditional release, and the focusing of effort on the important youth-crime problem.

The Judges prepared a separate, companion act which provides that any person arrested for an offense against the United States, subject to the approval of the court having jurisdiction over the person and the offense, may waive in writing an indictment by grand jury and consent to be charged by information, and may enter a plea of guilty to the information, or consent to a trial upon the information before the court without a jury. In many districts, intervals of several months elapse between the sessions of grand juries. It was thought desirable that offenders, particularly youth offenders, not be held in jails for long periods awaiting the return of indictments, that they should not be subjected to the contaminating environment of jails. Many such offenders will be willing to waive indictment, and enter a plea of guilty to an information or to consent to trials by the courts. The separate act contemplated this desirable procedure. Under the pending Federal Rules of Criminal Procedure, waiver of indictment by the defendant is admitted.

VI

The importance of this pending legislation is so great that it seems desirable to set out the basis upon which the expectancy of success is founded. That basis is the demonstrated experience under the Borstal system in England. It follows.

A report of a Department Committee on Prisons appointed by the Home Secretary in 1894 to inquire into the administration of

the English prisons found, among other things, that an extremely large number of youths between the ages of 16 and 21 passed through the prisons every year, that under the existing system numbers of these young prisoners came out of the prison in a condition as bad or worse than when they went in, and that the age when the majority of habitual criminals are made lies between 16 and 21 years. As a result, an experiment was begun in a wing of Bedford Prison. Younger boys were segregated from the men, and a special program of trade instruction, drill, and a scheme of rewards and encouragements to industry and good conduct was introduced. A wing of the prison at Borstal was set aside for the special handling of offenders between 16 and 23. By the end of 1902, the entire institution at Borstal was devoted to an intensive program for this age group of hard work and strict discipline, tempered by contrivances of reward, encouragement, and hope. From this experimental beginning has developed what is now known as the Borstal System in England. It now embraces eleven institutions. Five are walled. Four are completely open. Each institution has its own particular specialty. One provides complete facilities for craft training in metal and woodwork. Another is laid out and run as a summer camp with work and recreational programs which keep the boys out of doors. A third is largely devoted to agriculture and stock breeding. One recent institution develops skilled workers in the building trades. At one, the boys spend their entire work day at one kind of labor, reclamation of marsh lands of the North Sea at the mouth of the River Witham. While the institutions differ in many respects, they have certain things in common. These are, first, a full 16 hour day of arduous, active work and recreation, leaving no time for brooding or self-pity; secondly, an individual plan based on close acquaintance with individual needs and antecedents, and calculated to return the young man to society as a social and rehabilitated citizen; thirdly, a high degree of personal interest on the part of the staff, particularly the house master, whose chief job is individual guidance. The Borstal method of rehabilitation relies upon the physical, physiological, and social characteristics of youth which distinguishes them from both children and adults. It is predicated on the concept that criminal youth require special treatment because of the number and kind of offenses they commit, the causation factors underlying their conduct, and the prospect they hold out for success through correctional treatment. Three cardinal principles dominate the system: (1) flexibility, (2) individualism, and (3) emphasis on the intangibles. Flexibility

means that a premium is placed on experimentation and originality. Individualism is facilitated by careful study at an observation center to which all the boys sentenced to Borstal detention are sent, and by assigning each youth to the particular Borstal that is best fitted to meet his particular problems. The quality of the personnel is probably the most important of the intangibles. The System has attracted a capable and devoted personnel. Generally, persons between the ages of 16 and 23 may be sentenced to Borstal training. After commitment, the youth is sent directly to a classification center where he spends a minimum of thirty days before he is assigned. During the time he is under observation, a detailed study of his social and family background is made, and he receives a physical and mental examination. The assignment board then sends him to an institution of maximum, medium, or minimum security. During his stay in the institution to which he is allocated, the Borstal boy is not cut off from life in the outside world. He may receive frequent visits from his relatives and friends. Little limit is set upon the number of letters he may send or receive. Once a week, he goes on a route march, or informal hike, outside of the institution. For one or two weeks each summer he may camp with his group under the control of a housemaster in a completely free and unfenced spot in the country. If he is at one of the open institutions, he may go alone or in a group to a moving picture, and to classes in the town. In some instances, he is allowed to go home once during his period of treatment to see his family, or to arrange for a job after his release. Escapes are infrequent, only four percentum of the entire population of the eleven institutions. Great thoroughness is practiced in the steps to graduation, rehabilitation, and counsel. In 1936, out of England's total prison population of 8,964, there were only 688, or 8.1 percentum, ex-Borstal boys. At that time, 13,294 had graduated from the Borstal system. Our judges hope that their plan will turn 70 percentum of youth offenders into wholesome pursuits instead of permanently to the ranks of crime. Too much attention cannot be given to this salutary program. The judges were aware that within the Department of Justice much progress had been made in the more scientific treatment of offenders, in segregation, and in use of the probation system. They believed such measures wholly inadequate, and brought forward their proposed Federal Corrections Act.

In connection with the American Law Institute's Youth Correction Authority Act, its companion measure, The Youth Court Act, should be noticed. It is not so much a model statute as it is a declara-

tion of two basic objectives, (1) to shorten the time which now elapses between the arrest of the adolescent offender and the final disposition of his case, and (2) to improve the conditions under which he is apprehended and detained. It would cover offenders between the juvenile court jurisdiction and twenty-one years of age. It calls for additional judges who may sit as examining magistrates as well as to try cases. It provides for a "presenting attorney" whose duties go beyond those of the ordinary prosecuting attorney. The presenting attorney is directly responsible to the court, and his duties include: collection and organization of the evidence relating to allegations of violations of laws by persons within the age of jurisdiction of the court; cooperation with the police in securing evidence concerning the accused; determining, subject to the approval of the court, the propriety of further action against the youth; drafting accusations; performing, in general and concerning youths, the functions of the prosecuting attorney; assisting the court "in protecting society and the individual, and in administering justice to the innocent as well as the guilty." At least once a week, he is required to furnish the court a list of all cases which have not been disposed of by discharge or final judgment, together with information regarding the date of arrest, date of initiation of the proceeding, and the state of the proceeding in each case. The judge of the court is empowered to appoint counsel for the youth, a public defender in effect. Defense counsel is permitted to enlist the services of the legal aid society and other voluntary defender organizations. The court is authorized to appoint an administrative officer, who, in addition to being clerk of the court, is given supervision over plant and structures under the control of the Youth Court, and the management of detention places. To prevent the mixing in the courthouse "bull-pen," the court is authorized to designate a proper place for the detention of youth offenders. The case may proceed on information. No change is made as to bail, preliminary hearing, jury, counsel, publicity of trial, appeal, etc. The procedure is still the procedure of the criminal court, and the act is limited to operation in metropolitan areas. The idea of a permanent official whose function would be to defend the accused, and to oppose the prosecutor before the courts, has found increasing support since its introduction in California many years ago. H. R. 6628[23] is a modified form of a plan to maintain a salaried official to protect the rights of the accused. It provides that each district court may appoint a public defender for each place where it sits. The appointee

[23]77th Congress.

may be full-time or part-time, and have assistants in the discretion of the court. The bill carries a pauper's clause for all cases, and attaches only to the more important ones, not to petty offenses. The salary of the public defender is to be fixed by the Judicial Conference of the United States Circuit Judges. For more than a quarter of a century, the accused before courts-martial of record have been provided with defense counsel.[24]

In addition to the legislation proposed by the Judicial Conference of Senior United States Circuit Judges at its meeting in 1942, above described, the conference reached the following conclusions: (1) The sentencing function should be left in the trial courts. (2) Long term sentences should be finally fixed only upon the basis of a thorough study of the accused and the corrective effect of sentence upon him. (3) The general theory of the Borstal System is sound in the rehabilitation of youthful offenders. (4) The treatment of accused of all ages under minor sentences is unwholesome, and treatment in camps and under wholesome employment conditions should be practiced in lieu of idleness in unsanitary local jails in association with long-term prisoners. (5) Long delays between detention and trial are bad in all cases, and are especially so where the offense is a minor one. (6) Aid should be given discharged prisoners through some intelligent parole system for not less than two years. (7) The functions of sentencing and paroling must be correlated so that the functions may be discharged more wisely for the protection of society, and the rehabilitation of the offenders. It is significant that the judges insisted upon the retention of the sentencing and probation powers. In doing so, however, they sought every modern device for complete information about the accused person to the end that their judgment might be wise in these matters. It is fair to say of the whole picture of probation that it primarily forced itself upon the Department through the congestion of the prison population as a housing-relief device. Holiness followed housing pressure. The improvement of methods and personnel in the Department of Justice, combined with the increased public attention, seems to have given probation a primary place in the human-salvaging program. The third annual report of the Director of the Administrative Office of the United States Courts indicates that thirty-four thousand three hundred and fifty-nine persons convicted of offenses in the federal courts, including probationers, parolees and persons on conditional release, were under supervision by federal probation officers throughout

[24] 10 U. S. C. 1481, and 1488.

the country (except in the District of Columbia which has its own probation service) at the end of the fiscal year of 1942.

VII.

The program of Army penology[25] presently being carried out is one of the most extensive, thorough-going, and modern in Ameri-

[25]The system started when the United States Military Prison was established by R. S. 1344, as amended by Act 21 May 1874 (18 Stat. 48). The amendatory act fixed the location of the prison at Fort Leavenworth, Kansas, instead of at Rock Island, Illinois, as provided in the original act. The amendatory act, although passed before the enactment of the Revised Statutes, became effective as a subsequent statute, and as repealing any portion of the Revised Statutes inconsistent therewith, by virtue of R. S. 5601. Thereafter, provisions for the transfer of the military prison at Fort Leavenworth from the Department of War to the Department of Justice, to be known and used as a United States Penitentiary, were made by Act 2 March 1895, sec. 1. Subsequent provisions for the erection of a United States penitentiary on a site on the Fort Leavenworth Reservation, and for the restoration to the Department of War of the premises transferred therefrom to the Department of Justice, when such penitentiary should be completed, in accordance with the provisions of said Act of 2 March 1895, Section 1, were made by the Act of 10 June 1896, Sec. 1 (29 Stat. 380). The existing laws pertaining to or affecting the United States Disciplinary Barracks, guards, and disciplinary organizations were continued in force, except as specifically provided otherwise, by section 22 of the National Defense Act of 3 June 1916 (39 Stat. 181). There is authority given by Act of Congress to the Secretary of War to designate branches of the main disciplinary barracks at Leavenworth, a discretion which was exercised to establish branches in two places—Alcatraz and Castle William, respectively, at San Francisco and at Governors Island, New York (38 Stat. 1086). (Today, branches are located in every major geographical section of the United States.)

When General Crowder became Judge Advocate General on 15 February 1911, a controversy had been going on for years as to the treatment of military prisoners, particularly deserters. Annual reports, service journals, and the public press contained discussions of the general subject. One class of Army officers, perhaps the majority, believed in punishment for deterrent effect; another class favored reformatory methods. *Because of the relation of this subject to the administration of military justice,* The Judge Advocate General visited and inspected the main branch of our military prisons in October 1911, and filed an extensive report on 17 November 1911. His report gave attention to the statute law, the Act of 1874, establishing the prison and prescribing its government. The organic act followed closely the legislation of the several States for the establishment and maintenance of penitentiaries. In some respects the law establishing the military prison was less humane than later legislation establishing penitentiaries at Leavenworth, McNeil Island, and Atlanta; and the same illiberal rigid character was found in regulations adopted from time to time by the War Department in aid of the execution of this military prison statute. In the regulations, the War Department had interpreted uniformly the law as requiring the prison to be administered as a penitentiary. The prisoners were required to wear the usual prison-striped clothing, to wear their hair close cropped, to be designated by numbers, and to be employed at the kind of daily hard labor at which convicts confined in civil prisons and penitentiaries are customarily employed. General Crowder expressed surprise at the youth of the prisoners in the military prison, their average age being twenty-three years. Seventy-one percentum were confined for purely military offenses and only a comparatively small number for serious common-law crimes. He then visited the United States Penitentiary, also at

can history. With the back-log of those out of some fifteen millions of men who have violated the laws of the United States under the stress and excitement of war conditions, obviously, the task is one

Fort Leavenworth, where he found the inmates of much more advanced years, all felons, but subjected to no more severe prison regime than were the young ex-soldiers in the military prison. He concluded that the practice in the military system was fundamentally wrong. He reached the following conclusions in his report:

"In view of the fact that we are legislatively committed to the minimum use of the labor of military prisoners on new prison construction, the change from prison to detention barracks must await the completion of said construction—about two years—unless it can be assumed that Congress will be found willing to complete said construction by contract labor. But when the new prison is completed the way will be open tc inaugurate the change, which can be administratively accomplished, except in the following regards, where it would be advisable to have amendments of the existing law so as to provide:

"1. For changing the name 'United States Military Prison' to 'United States Detention Barracks,' and for making the designation of the inmates of the detention barracks uniform by eliminating the term 'convict' whereever necessary and substituting therefore the term 'prisoner,' which latter term is used in the existing law as synonymous with the term convict.

"2. For exempting the detention barracks from the existing provision vesting the government and control of the prison in the Board of Commissioners of the United States Soldiers' Home; this for the reason that the detention barracks would become an integral part of the military establishment, to be administered directly as any other department thereof.

"3. For modifying the provision of existing law respecting the employment of prisoners in said detention barracks so as to limit the daily hard labor of prisoners confined therein to what is required for purposes of domestic administration, as outlined above by the prison commandant, and directing that prisoners not so employed shall be subjected to a rigid course of military training and instruction.

"4. For exempting from the prohibitions of section 1118 of the Revised Statutes against the enlistment in the military service of any deserter therefrom and of section 2 of the Act of 1 August 1894 (28 Stat. 216), against the re-enlistment in the military service of any soldier whose service during his last preceding term of enlistment has not been honest and faithful, all good-conduct prisoners discharged from the detention barracks or post guardhouse with the recommendation of the authorities of the detention barracks or post that they be permitted to re-enlist.

"5. For the modification of the requirements of sections 1996 and 1998, Revised Statutes, so far as they provide that the forfeiture of citizenship rights or of the right to become citizens shall not attach to a conviction of desertion committed in times of peace."

The last recommendation (No. 5) was designed to remove the forfeiture of citizenship rights, or of the right to become citizens, which those statutes imposed in case of desertion committed in time of peace, leaving that penalty in force for desertion committed in time of war. Those statutes had their origin in the Civil War Act of 3 March 1865, and represented the then thought of Congress on the subject. It was a sweeping, drastic provision which required that this penalty of forfeiture of citizenship rights and of the right to become citizens should attach automatically to a conviction of desertion and made no distinction between peace and war. The Judge Advocate General prepared and submitted projects of legislation to carry out (4) and

of large proportions. The exercise of clemency is an incident of the military system from the time charges are contemplated until the sentence has been executed. Army regulations provide for the

(5) for the War Department which in turn transmitted them to the Congress. A project of an act repealing the prison statute and substituting therefor the disciplinary barracks statute, which ultimately became the Act of 4 March 1915, was submitted by The Judge Advocate General to Congress on 27 May 1912. That project provided for both restoration and re-enlistment of good-conduct prisoners.

At his inspection in 1911, The Judge Advocate General found purely military offenders held in close association with common-law and statutory felons. He recommended in his report the segregation of these military offenders, and on 29 December 1911, this recommendation was carried into effect by the issue of orders prepared by him directing that all felons held at Leavenworth, with the exception of a few with short periods of confinement remaining to be serviced, be transferred to Alcatraz; and all prisoners at Alcatraz convicted of purely military offenses, with like exceptions, be transferred to Leavenworth; giving to Leavenworth prison the character of a disciplinary barracks or reformatory, but continuing Alcatraz as a penal institution. The same order changed the designation of the inmates at Leavenworth from military convicts to general prisoners. The purpose of The Judge Advocate General was to effect immediately ameliorative reforms in so far as the statutes would permit. Nothing further was accomplished in the way of prison reform in the year of 1911. His report was submitted in November, and segregation was an accomplished fact before 31 December 1911. What was done was preparatory to the inauguration of greater reforms when the necessary legislation could be secured from Congress.

In May of 1912, The Judge Advocate General appeared before the military committee of the House in support of the then pending revision of the Articles of War. Section 2 of that revision contained the reform of prison statutes. The salient features of the bill were: (1) Changing the designation from prison to barracks. (2) Segregating military offenders from felons. (3) Placing the control of the barracks directly under the control of the Secretary of War. (4) Authorizing prisoners confined in the barracks to be placed under military training with a view to honorable restoration to duty or re-enlistment; and (5) Authorizing the Secretary of War to restore to duty prisoners confined in said barracks. This section 2, along with the revision of the Articles of War, failed of a favorable report by the House Committee. However, on 22 August 1912 (37 Stat. 356), Congress enacted the law recommended by The Judge Advocate General in his 1911 report exempting peacetime deserters from the loss of citizenship rights, and permitting re-enlistment of peacetime deserters and other classes or prisoners whose prior service had not been honest and faithful, when specially authorized by the Secretary of War. Thereupon the policy of re-enlistment of prisoners confined in the military prison was immediately entered upon.

As indicated, upon the enactment of 22 August 1912, the policy was commenced of recommending deserving general prisoners confined in the military prison for re-enlistment. In the annual report of the prison commandant for the fiscal year ending 30 June 1913, is found the statement that sixty-three general prisoners had been recommended for re-enlistment under that act. In August, 1913, The Judge Advocate General made a second inspection of the military prisons, and in his report of that inspection recommended that steps should be taken in advance of any authorization by Congress to inaugurate that part of the scheme of reform which looked to military training of deserving general prisoners. On 17 September 1913, there was issued from the War Department, upon his recommendation, General Order No. 56, War Department, 1913.

General Order No. 56 authorized and directed the organization of a maximum of four disciplinary companies at Leavenworth prison to be composed

periodic examination for clemency of the case of each prisoner under sentence of a court-martial, once within the first six months of confinement, and annually thereafter. Special hearings may be

of general prisoners serving sentences for purely military offenses, and further authorized one disciplinary company at Castle William, Fort Jay. It directed that members of the disciplinary organization were to be taken out of prison garb, and put into uniform. They were to be known by name and not by number, separated from other prisoners, permitted to render and receive the military salute, and to be armed, equipped, and trained as infantry—all for the purpose of developing their own self-respect, and fitting them for restoration to duty. Disciplinary companies were organized rather promptly in the remaining months of 1913 and January, 1914.

It was not until 6 February 1914 that the pending bill to convert the United States Military Prison into a disciplinary barracks was favorably reported by Senator Chamberlain with some amendments made by the Senate Military Affairs Committee of which he was then the chairman. The bill failed to pass at that session of Congress, but partial relief was given in the Act of 27 April 1914 (37 Stat. 346, 352), and in the form of a rider on the annual Army appropriations bill, authorizing a suspension of the sentence of dishonorable discharge when there was reasonable hope of reclaiming him. The legislation was inserted upon the insistent recommendation of The Judge Advocate General. As to all men thereafter convicted and sentenced, with a suspended dishonorable discharge, steps could be taken to restore the men by remitting the dishonorable discharge, of which the execution had been suspended, and in this way send them back to their organizations. This was followed by instructions to commanding generals to suspend sentences of dishonorable discharge whenever there was a probability of reclaiming the soldier to honorable service. (G.O. 45, June 9, 1914). In this order it was announced, that "the object in seeking the legislation authorizing the suspension of dishonorable discharge was to afford a plan of giving soldiers convicted of purely military offenses an opportunity to reclaim themselves and gain restoration to the colors."

There still remained the large class already in confinement whose sentences of dishonorable discharge already had been executed, and who did not come within the provisions of the foregoing Act of 27 April 1914, General Order No. 45. Under the accepted construction of the statute, they could only get back into the service under the legislation of 22 August 1912, heretofore noted—that is, by re-enlistment for a full term. Not being willing to wait further for the enactment of the pending bill, which would have included them, The Judge Advocate General directed a study of Section 1353, Revised Statutes, which is section 6 of the original prison act, to see if there could not be deducted therefrom this power of restoration as to inmates of the prison whose discharges had already been executed. The officer who made the study (Ansell) concluded that the act was sufficient to reach this class of prisoners. Secretary of War Garrison gave the opinion his careful consideration, and approved it 7 March 1914. The Secretary was not without doubt as to its legal correctness, but believed that Congress would ultimately validate this procedure by giving it the necessary statutory sanction. From that time on, recourse was had to both courses—i.e., to re-enlistment for the full term, and to restoration to an old enlistment in dealing with the inmates of the prison. At the time, probably a majority of the officers outside of the War Department viewed the reform with apprehension, as they believed in punishment for deterrent effect.

Prior to the opinion and direction of the Secretary of War broadening the construction of section 1353, Revised Statutes, sixty-three inmates of the prison had been recommended for re-enlistment in the fiscal year ending 30 June 1913, and nearly twice that number before the date of the opinion in 1914. The first man restored under the opinion was restored on 14 March 1914. The record of the fiscal year ending in 1914 at the Leavenworth Prison

had when justified by the facts and circumstances. The federal civil system is oriented under the Department of Justice, the law officer of the Government. Within the War Department, the control is

shows that forty percentum of the men discharged from the prison in that year were recommended for re-enlistment. Many preferred that course to restoration. From 14 March to 30 June 1914, thirty-nine men were restored.

Prior to the bill repealing the prison act and substituting the disciplinary act, the reforms carried out by executive orders and by acts of Congress may be summarized as follows: (1) Classification and segregation of prisoners, December 1911. (2) Re-enlistment of inmates as authorized by Act of 22 August 1912. (3) Organization of disciplinary battalions and companies, and inauguration of military training for purely military offenders, 17 September 1913. (4) Instructions to department commanders to suspend sentences of dishonorable discharge inaugurated under Act of 27 April 1914. (5) Disciplinary battalion established on 14 October 1914, at branch military prison at Alcatraz, extending to misdemeanants confined there the privileges of military training and instruction.

So it was that the system of reform was pretty well established in its more essential features before Congress finally came to enact the law for the repeal of the prison statutes, which it did on 4 March 1914, as a rider on the Army appropriation act. But the act of that date did abolish the penitentiary character of the institution, change the name, and convert the institution in a very real sense into a military reform school, where every inmate could earn by good conduct, irrespective of the length of his sentence, an honorable restoration with the colors, and an honorable discharge. Little remained to be done under the act of 4 March 1915. By General Order No. 21, 13 April 1915, drafted by The Judge Advocate General, the disciplinary battalion and companies were reorganized. The Judge Advocate General had realized that this scheme was not complete unless we had some corresponding measure of relief for those who could not be recommended for either re-enlistment or restoration, and he proposed the relief contained in a separate rider, not part of the prison section proper, to the Army Appropriations Act of 4 March 1915. It gave authority to the Secretary of War to establish a system of parole for inmates of the disciplinary barracks (C. 143, sec. 1, 38 Stat. 1075). On 18 May 1915, regulations were issued under it providing for the release of men back into civil life who had served at least half of their sentences. The parole provision was a companion piece of legislation designed to cover the entire population of the prison.

The system as it was thus built up and as it existed, the disciplinary barracks at Fort Leavenworth and its two branches at Alcatraz and Governors Island, was to be sharply distinguished from penitentiary servitude. They were the reform schools of the Army, the primary purpose of which reform was to fit inmates for honorable restoration to duty with the colors or for useful employment in civil life. The essentials established of the system of military penology of the Army were: (1) The indeterminate sentence (effected by means of a suspended sentence of dishonorable discharge, remission of the unexecuted portion of the sentence of confinement, and restoration to duty or permission to re-enlist); (2) Fitting men for restoration by training them and stimulating their self-respect through—(a) Military training and instruction in the disciplinary battalion. (b) Taking them out of prison garb, and putting them in uniform; not calling them "convicts"; giving them the privilege of the military salute; treating them as soldiers under intensive military training. (c) Industrial as well as military training; all tending to stimulate the soldier's self-respect, and a sense of his own value, and giving him an opportunity for greater usefulness in his organization, and to earn more money upon return to civil life, and become a better citizen. (3) The parole, by which the man's fitness for restoration to civil pursuits may be tested; and (4) Honorable restoration to duty with the colors.

From the time when Secretary of War Garrison approved the scheme,

vested primarily in an administrative officer.[26] He may have the advice of the law department, and does.

The purpose of the Disciplinary Barracks is to aid in the restoration of offenders, to make them worthy, good soldiers, and good citizens. The period that a man is detained in the Barracks lies within his own hands. The sentences are maximum sentences. Of course there is authority to hold a man for the entire period for

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and transferred the administration of the prisons from The Adjutant General's Department to The Judge Advocate General's Department under General Order No. 56, and placed The Judge Advocate General in charge, until by the Act of 4 March 1915, by which the control was vested in The Adjutant General's Department, the men restored to duty completed the terms of their enlistments with a lower desertion rate than was made by men who reached their organizations through the recruit depots by ordinary process of enlistment. Not infrequently they became non-commissioned officers.

The program of restoration from the time of the reform through the World War is noteworthy. Ignoring the re-enlistments, which were considerable in number, and dealing only with restorations, the following is the record of the men restored to duty from the disciplinary barracks and its branches for the years 1914 to 1919 inclusive: Fiscal year 1914, 39; 1915, 139; 1916, 193; 1917, 436; 1918, 678; 1919, 1,417; total, 2,902. 2,448 men were restored to duty between 6 April 1917 and 21 August 1919. The average sentence in years actually served by these men so restored was less than six months, or 0.49 of a year. Two thousand four hundred and forty-eight men restored served less than six months (average) in the disciplinary barracks. Within this average, the prison commandant and his officers had adjudged that their reformation was so complete as to justify their being restored to duty with the colors. The average sentence of three and one-half years was served by these men by an average confinement of less than six months. Even some of the men serving even the long-term sentences earned their restoration in less than six months. The net result of the Army disciplinary barracks administration was that out of 13,593 men passing through the United States Disciplinary Barracks between 1 April 1917, and 31 July 1919 (including 2,101 in confinement on 1 April 1917, and 11,492 sentenced to the Barracks between 1 April 1917, and 31 July 1919), only 3,839 remained in confinement in the various Barracks on 31 July 1919; being only 1,738 more than were in the Barracks at the beginning of the war, in spite of the great increase in the Army during the war, and of the number of unfit men of various kinds who were necessarily brought into the service through the operation of the draft.

In France, general prisoners were confined in two camps—at general intermediate storage depot (Gievres), and at St. Sulpice, near Bordeaux. Both these camps were under the jurisdiction of the Commanding General, Services of Supply. On 13 June 1919, that officer was directed to send all general prisoners to the United States as soon as transportation was available. On 30 June, there remained in the two camps 108 general prisoners; on 31 July, there were but two. An indeterminate number were en route to the United States on 31 July 1919, either at Brest, in France, or on the seas. On 13 August, there were but 12 remaining at Brest.

Although quite a proportion of the sentences to the Disciplinary Barracks were, nominally, for long terms of years, yet, in fact, the actual sentence served by the 9,754 men who were released from the Barracks (including the men restored to the colors) during the period of the war, averaged only 1.06 years. During the month of August, 1919, the number of men in the Barracks was further reduced, so that on 30 August 1919, only 3,728 men remained in confinement, or only 1,627 more than at the beginning of the war. Congressional Record.

[26] Act of 4 March 1915, 10 U. S. C. 1453.

which he is sentenced. It is written into the terms of the statute, authorizing suspension of dishonorable discharge, that these men are there for the purpose of earning remission of that particular sentence of imprisonment and dishonorable discharge, and getting back into the service.[27] This gives the sentence an indeterminate character. There is no minimum sentence prescribed by statute. All sentences are fixed sentences; but, under the operation of the law, they may be remitted. For example, a forty-year sentence, with good conduct, may become a six months sentence. The word indeterminate does not occur in the Articles of War. From April 6, 1917 to August 31, 1919, at the main branch of the Disciplinary Barracks, Fort Leavenworth, Kansas, of 1,410 men with an average sentence in years adjudged of 8.8 years, the average sentence in years actually served was 0.43 of a year.[28]

The press reports describe the expanded program in the creation of the Correction Division within the Office of the Adjutant General in 1944. This was followed by the superior, policy making, board of review, the Advisory Board on Clemency in the Office of the Under Secretary of War, which, in turn, recently was implemented by five special clemency boards, each exercising review action of particular classes of cases. It is interesting that the general board was headed on organization by a United States circuit judge, and aided by a justice of a State supreme court.[29]

VIII.

It should be noted in passing that all improvements made within the Department of Justice for detection, conviction, and punishment and rehabilitation, as well as those contemplated by the conference

[27]See 10 U. S. C. 1456, 1457b, 1457, 1457a.

[28]Annual Reports.

[29]The 17 November 1945 issue of the Army and Navy Journal, Washington, D. C., carries the following comment at page 426: "Owen J. Roberts, former Associate Justice of the United States Supreme Court, has accepted appointment as Chairman of the War Department Clemency Board, which recently began to review the cases of all of the 34,260 military prisoners now serving general court martial sentences, with a view to effecting such reduction in sentences as may be warranted on the basis of the individual records in each case. In announcing the appointment, Under Secretary of War Royall said: 'The aim of the clemency board is to assure the application of even-handed justice through the review of sentences adjudged by courts martial in all parts of the world. The acceptance of the chairmanship by Justice Roberts will be of extreme assistance in guaranteeing that the highest standards of fairness will be maintained in this post-war review and that clemency will be granted wherever it is warranted.' In addition to Justice Roberts, the members of the War Department Clemency Board are Austin H. MacCormick, Vice-chairman; Brig. Gen. Rufus S. Ramey, Col. Hubert D. Hoover and Col. Conrade Snow, with Lt. Col. James P. Hendrick serving as alternate in the temporary absence of Colonel Snow."

of Senior Circuit Judges, and by the American Law Institute, either contemplate or depend upon a select and trained corps of officers fortified by as complete as possible a body of expert and scientific data.

The actual reforms, other than inter-department improvements of personnel, materials and methods, recently effected in this federal procedural field, include the rules of procedure for proceedings to punish for contempt, pursuant to the Act of November 21, 1941; rules with respect to proceedings after verdict, prepared pursuant to the Order of the Supreme Court of November 17, 1941; and the rules with respect to appeals by the Government under the Act of May 9, 1942. The last two items represent, in a large part, a proposed revision and expansion of the Rules for Criminal Appeals adopted by the Supreme Court on May 7, 1934. The Act of February 24, 1933, conferring upon the Supreme Court power to promulgate rules governing criminal appeals, does not require submission of the rules to the Congress prior to their becoming effective. The Act of June 29, 1940, which authorized the adoption of rules with respect to proceedings prior to and including verdict of guilty, and the act of May 9, 1942, relating to appeals by the government, contain such requirement. There are also pending proposed rules on the selection of jurors which contemplate uniformity in the method of selection both as to civil and criminal cases in the federal courts. A preliminary draft of proposed rules of pleading, practice, and procedure with respect to proceedings prior to and including verdict or finding of guilty prepared pursuant to the Order of the Supreme Court of February 3, 1941, was submitted to the Supreme Court on May 3, 1943, by the Advisory Committee. The rules will become effective as above indicated.

Non-Military Criminal Procedure—American, English, French

In much of our contemporary literature excoriating the "technical" nature of criminal procedure and stressing the need for "simplification," procedural rules are held out as the principal reason for miscarriages of justice and ineffectiveness of administration. It constantly has been asserted by an influential school of institutional commentators that the defects of criminal law administration in the United States are due in large part to our failure to "adapt" eighteenth century English institutions to modern conditions. A variation of this "failure to adapt" thesis was voiced by Mr. Pierre Crabites, formerly American Judge of the Mixed

Tribunal at Cairo, Egypt.[30] Trial by jury in criminal prosecutions in this country does not work, he writes, because the American Juror, instinctively sympathizing with the "underdog" defendant and fiercely resenting the "rules of the game," will vote for a verdict of acquittal in apparent defiance of the evidence. "He may not know it," writes Judge Crabites, "but his subconscious sympathy goes out to the prisoner. He frets when the district attorney attempts to lord it over the accused. It makes his blood boil when he learns what an indictment really is, and what a grand jury typifies. He does not picture the trial judge as an oracle with a message from the Almighty. His rebellious instinct makes him prone to acquit because his inner consciousness is arrayed against what he considers the insolence of authority." And what is still more important, he feels that the man who is in jeopardy is of his own flesh and blood, not one of "those people." He looks at the trial subjectively, not objectively, because "it is his ox that is being gored." The criminal jury trial works well in England, on the contrary, because the "caste-ridden" English juror is influenced by no such subconsious sympathy for the "under-dog."[31] The object lesson which Judge Crabites draws from his easy assumption of a wide divergence in psychological attitude between English and American trial jurors is obvious. Our forebears transplanted on the shores of "caste-free" America the "roots of a system of criminal law that cannot produce healthy fruit when removed from the atmosphere of caste." This unfortunate historical blunder "explains why the criminal courts of Britain win the plaudits of the world and why the finger of scorn is pointed at ours." Our benighted eighteenth century English institutions consequently must be made over in order to make them square with our prevailing

[30]Why American Criminal Justice Is a Failure, 23 A. B. A. Jour. 697 (1937).

[31]"The English juror," says Judge Crabites, "with his water-tight compartment type of mind, with his brain a congeries of caste cells, considers himself a superior being appointed of the Lord and designed by a Wise Providence as a gracious sovereign to pass upon the guilt or innocence of 'these people.' They are not of his world. They mean nothing to him. He looks at the matter objectively, not subjectively. He is of another sphere than those who are passed in review before him. Moreover, he is absolutely dominated by another infinitely superior being, the trial judge. If the English juror considers himself as a being of a different caste from the prisoner at the bar he knows that the judge belongs to a still higher caste. This recognition gives the latter a moral ascendancy over the jury that no American judge can possibly have in the United States. The result is that when the English Bench makes its final summing up of the evidence and charges the jury, it is addressing wax discs that caste has made impressionable. In a word, there are thirteen on the British jury, the thirteenth, the judge, incarnates its law-finding, its fact-finding, its sentence giving attributes."

and cherished concepts of social equality and political democracy.[32]

Judge Crabites makes no specific recommendations, and disclaims any thought of favoring the introduction of Continental jurisprudence into the United States, but it may be gathered from his animated and appreciative discussion of French criminal procedure, and his comparison of it with English and American methods to the vast disadvantage of the latter, that he would abolish the grand jury and its bill of indictment, curb the functions of the prosecuting attorney, introduce some form of secret and inquisitorial preliminary examination presided over by a magistrate analogous to the French *juge d'instruction,* wipe out the "hypocritical" presumption of innocence and the requirement of proof of the defendant's guilt beyond a reasonable doubt, subject the prisoner to a rigorous examination by the trial judge, restrict the right of cross examination by counsel on both sides, but allow defense counsel the right to make the concluding address to the jury.

It is certain that many devices and techniques utilized in Continental procedure are at hopeless variance with the juristic ideals of Anglo-American countries. But it does not follow that life and property are necessarily any more secure in France than in England, or in turn, than in America. The basic differences between American and English jury trials lie in the independence of the prosecutor of the court, the greater authority of the judge during the trial, and in summing-up. The independence of the prosecutor is peculiarly American, and without some counter-balancing factor, perhaps Judge Crabites' point is well taken. Such factors are suggested by the proposed office of public defender, and in the American Law Institutes Youth Court Act's "presenting attorney." Counsel representing the Crown are, on the whole, much less partisan in their methods than are our prosecuting attorneys. The fact that in England all prosecutions during the single term of court may be conducted by different counsel, or that the same barristers may appear for the Crown in some cases and for the defense in others, is of great importance. It is, moreover, a consideration often lost sight

[32]"What I say," Judge Crabites concludes, "is that our criminal procedures should be amended in such a manner that American jurors will be convinced that the accused has had a fair deal, that they will not convict when they feel in their hearts that the cards are stacked against him. It is because Americans challenge the rules of the game, when they consider them arbitrary and unfair, that they acquit in many cases where Englishmen would convict. If we are dissatisfied with present conditions these rules of the game should be changed. They never will be as long as we live in a fool's paradise that the common-law is perfect and that because it gives the English the type of justice they want, it should necessarily be workable in this country."

of by institutional critics who undertake to contrast law administration in the two countries. The English judge is made responsible for the trial and its conduct, and thus his supervision and impartial examination of witness to probe the truth of the issue appears affirmatively. Our federal judges apparently are becoming more active in this aspect of administration and in the public interest. Elective state judges are most reluctant to "spoil a lawyer's case" by driving to the core of the thing, preferring to remain silent umpires until stimulated to rulings by either of the adversaries, who, too often, appear to the public as the lawyers. The outstanding difference in the effectiveness of the English court in criminal cases is the uncomplimentary difference in comparable capacity and character of the judicial personnel. As long as our judges are to be elected for biennia or little more by their skill on the stump, and not on the bench, the less they participate in the trial perhaps the better the trial—and the more pathetic the system.[33]

The Summary Jurisdiction Movement

There is one feature of the English criminal, non-military procedure which bears peculiar analogy to the military practice. The recent and phenomenal rise of summary jurisdiction in England is another factor which distinguishes the civil criminal process in the two countries. The tendency in Parliament within recent years to enlarge the powers of courts of summary jurisdiction to hear and determine *indictable* offenses is the most important development in the administration of English criminal justice during the last half-century. It has resulted in the virtual obsolescence of the criminal jury in the country that gave it origin some six hundred years ago, and that nurtured it through centuries of social strife and institutional charge. In England, during the year 1933, not less than 61,264 defendants charged with indictable offenses were dealt with in courts of summary jurisdiction, leaving only 9,201 to be committed for jury trial in the higher courts. It is significant that most of the cases disposed of summarily did not result from petty infractions of the criminal law, but were prosecutions of grave offenses which, in most jurisdictions of the United States, would be dealt with by juries. The statistics will be more easily understood if it is borne in mind that the old common law distinction between felonies and misdemeanors is no longer of any vital significance in England. Crimes are classified as indictable and non-indictable, a practical

[33]See in general, Howard, Criminal Justice in England (1931).

distinction based upon the mode of trial. Non-indictable, or minor offenses are tried in the great majority of the cities and counties by benches composed of lay justices of the peace. In London and a few of the larger cities, the same types of cases are tried by professional police-court magistrates. These non-indictable cases, being tried without juries, are said to be dealt with summarily; the hearings are called summary trials, and the courts themselves are referred to as courts of summary jurisdiction. Indictable cases, on the other hand, may be subdivided into two classes—crimes of the utmost gravity, such as murder and manslaughter, which the law still requires must be tried before juries, and the large and constantly growing number of important offenses referred to above that may now be dealt with summarily, providing the prisoner waives his right to jury trial, and the bench of justices before whom the matter is pending considers such disposition expedient.[34] The Criminal Justice Act of 1925[35] which set up a new and enlarged schedule of indictable offenses triable summarily, and simplified the whole mode of procedure, resulted in a large part from a recognition by Parliament of the efficient manner in which courts of summary jurisdiction dealt with a large body of offenses created during a period of war emergency—offenses which a half-century ago unquestionably would have been reserved for jury trial. It is probable that the function of summary jurisdiction will be increased. A commentator in an English law review referred to the Criminal Justice Act as "simply another long step on the road toward the replacement of the jury by the justice."[36]

The jury trial is not the only time-honored institution which recently has undergone depreciation in England. The grand jury which Judge Crabites says "shocks the French mentality," and is regarded by that nation as a "relic of barbarism and blot upon our vaunted civilization," was abolished by statute in 1933.[37] For many years it had done little more than ratify committals for trial by examining magistrates.

While the province of the criminal jury has been encroached upon recently in the United States as well as in England, the development has been made possible in the federal courts by judicial decision. The basic difference in the two types of non-jury trials

[34]See Howard, The Rise of Summary Jurisdiction in Criminal Law Administration, 19 Calif. L. Rev. 486 (1931); Criminal Statistics, 105-7v (1933).

[35]15 & 16 Geo. V. C. 86.

[36]161 Law Times 91 (1926).

[37]Administration of Justice Act, 1933, 22 and 23 Geo. V. C. 36, s. 2. See Lieck, Abolition of the Grand Jury in England, 25 Jour. of Crim. Law and Criminology, 623 (1934).

used in the two countries lies in the fact that, in the United States, the trial is conducted by a judge of the higher criminal court rather than by justices of the peace or a police-court magistrate. Further inroads on the jury in this country have resulted from the widespread practice of accepting pleas of guilty, and from the frequent use of the nolle prosequi, and other modes of ending prosecutions.

A trial for a felony in the federal courts may be had without a jury, but "the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant."[38] Under the specific provisions of state constitutions for trial by jury, the holdings of state courts are at variance as to whether, without or with a statute purporting to so authorize, a state court may try a person accused of a felony without a jury at his option. A few state constitutions expressly permit waiver.[39] The Judges Bill discussed above in connection with the Federal Corrections Act makes provision for extensive use of summary jurisdiction. It will be important to note what Congress does with the proposals.

THE THEORY OF PLEADING UNDER THE COURT-MARTIAL SYSTEM

We already have noted that most of our contemporary literature dealing with the civil criminal law abuses the "technical" nature of criminal procedure; and stresses the need for "simplification," holding out procedural rules as the principal, if not the sole, reason for miscarriages of justice and ineffectiveness of administration. Little heed is given to the baffling complexity of the problem of crime or to its causes. The widely publicized results of what has been euphemistically called "the sporting theory of justice" are the stock in trade of every college debater and journalistic analyst, and are usually assumed without argument; interminable delays and continuances, cumbersome grand juries, long trials, appeals on obsolete doctrinal points, and the like. Proposed reforms have included simplification of indictment or information, regulation of bail bond, rendition of jury verdicts by five-sixths (or some less than unanimous proportion), new rules to speed-up appellate procedure, enlarged judicial control of the trial, waiver of the jury trial by the defendant, judicial control of the selection of the jury, new rules relating to the insanity defense, and more stringent regulation per-

[38](1930) Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854. See Rule 21 of the pending Federal Rules of Criminal Procedure.

[39]See Oppenheim, Waiver of Trial by Jury in Criminal Cases, 25 Mich. L. Rev. 695 (1927); and Goldberg, Waiver of Jury in Felony Trials, 28 Mich. L. Rev. 163 (1929).

taining to probation, pardon, and parole. We shall consider the sources of crime under military law as an occasion to discuss the substantive law and the theory of command and discipline. The various phases of military procedure will come up in sequence. Primary is the theory of pleading.

Those who feel alarm or suspicion of the law and procedure of Army court-martial practices fail to realize that the system is statutory—statutes of the United States. It is a correlated single code of law and procedure emanating from the popular representative system, and kept by it under more vigilant supervision and inquiry than perhaps any other statutory body or code.

We have noticed that the great reforms now pending in the federal civil criminal law are being solved by giving to the head of the judicial system, namely the Supreme Court of the United States, rule-making power. That was done at the outset in regard to equity and admiralty, and recently has been greatly extended. The rule-making power was extended to the head of the system of military justice, namely, the President of the United States, by the 38th Article of War in 1916.[40]Pursuant to the authorization by the Congress, the President, from time to time, has published the rules of court-martial, or military criminal procedure and practice in the Manual for Courts-Martial. The statute provides that the rules made pursuant thereto "shall be laid before Congress annually." The function and opportunity of legislative audit are retained in continuous supervision. The new sets of federal civil rules were submitted initially to the Congress.[41] In approaching the problem it

[40]10 U.S.C. 1509.

[41]The established construction of the President becomes the expression of the legislative will. This situation was averted to in (1940) Sibbach v. Wilson & Co., 312 U. S. 1, 14, 61 S. Ct. 422, 85 L. Ed. 479, wherein, on a similar matter of construction, the Supreme Court, after referring to the change in policy leading to the promulgation of the new rules of civil procedure stated:

> "The challenged rules comport with this policy. Moreover, in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislation. The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses. * * * That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found." See also (1941) U. S. v. Sherwood, 312 U. S. 584, 61 S. Ct. 767, 85 L. Ed. 1058.

The appended note to the above quotation indicates that the Supreme Court

should be borne in mind that, contrary to popular belief, the code of criminal law and procedure set out in the Manual for Courts-Martial is one of the most enlightened and free from justice-defeating technicalities of any under any American authority. One of the principal bases for this is found in the fundamentally sound and fair pervading thesis of notice pleading. Simplicity and fairness are the dominant characteristics. The blight of justice defeating technicalities was abated by the Congress through Article of War 37.[42] As provided in the above article, the charge and specification in issue must specify or allege an act upon which the accused has been tried which constitutes an offense denounced and made punishable within the jurisdiction of the trial court-martial. This in the simple requirement that the pleading must state a cause of action. The theory of notice pleading is the reflection of the fundamental concept of due process of law, namely, that the accused may be fairly apprised in advance of his trial in order that he be able to prepare his defense, cross examine intelligently, and marshall his evidence under the issues involved in his own defense.

One fairly apprised of the substance of the charges against him cannot reasonably complain because no pre-set, artful expression is used.[43] The legislative policy of stripping purpose-defeating technicalities from the courts-martial procedure is followed through in the promulgated rules in providing: "A plea in abatement is one that operates to delay the trial, and is based upon some objection to the specification as inartificial, indefinite, or redundant; or

recognized this as a long established practice of the Congress designed to make sure that the construction given a statute conformed to its intention. To the same effect is United States v. Tot, (1942) 131 F. (2) 261, 265, wherein the Court held that a later Act of Congress adopted the interim administrative construction, which the court said "Congress impliedly confirmed as being correctly interpretative of the legislative intent." See also Aluminum Co. of America v. U. S., (1941) 123 F. (2) 615, 620.

The rules of military practice and procedure are thus the work of both elective branches of the government. They are not the cloistered secrets of an autocratic military tyrant, if there be such a thing; but the public records of popular government. They are available to all at nominal cost for the asking in "A Manual for Courts-Martial United States Army," United States Government Printing Office, Washington, Price $1 (Buckram).

[42]"The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of the accused: Provided, that the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles . . ." (10 U.S.C. 1508).

[43]This is a major goal of the pending Federal Rules of Criminal Procedure.

as a misnaming of the accused; or as containing insufficient allegations of time or place. If the plea is sustained the court will, according to the circumstances, either direct that the specification be stricken out and disregarded or permit the specification to be amended so as to obviate the objection."[44] Under "motion to strike out," it provides: "By this motion the accused may object to the sufficiency of a specification on the ground that it does not state any crime or offense; or that, because of some substantial defect, the accused is actually prevented from making a proper plea or defense, for example, that it does not fairly apprise the accused of the offense intended to be charged."[45] The element of fairness can find balance within the purpose of the function of government only when the interests of both sides, those of the people as a whole on the one hand and those of the accused on the other, are equated. The Manual for Courts-Martial further provides, "If a specification, while defective, is nevertheless sufficient fairly to apprise the accused of the offense intended to be charged, the court, upon the defect being brought to its attention, will, according to circumstances, direct the specification to be stricken out and disregarded, or continue the case to allow the trial judge advocate to apply . . . for directions . . . or permit the specification to be so amended as to cure the defect, and continue the case for such time as in the opinion of the court may suffice the accused properly to prepare his defense in view of the amendment. The court may proceed immediately with the trial . . . if it clearly appears . . . that the accused has not in fact been misled in the preparation of his defense and that a continuance is not necessary for the protection of his substantial rights."[46] If the pleading is basically fair upon the facts and free from any substantial element of surprise, the court may proceed with the trial. It should be noted that the force of Article of War 37 is not spent when the court has reached its findings, but pervades the entire procedure on appeal and review with the affirmative duty imposed upon the reviewing and confirming authorities to assure that no substantial rights of the accused are prejudiced adversely in any material manner. This duty attaches automatically to the case without danger of waiver, as occurs in a civil case, through some failure on his part to plead specially on appeal.[47]

[44]MCM, page 51.
[45]*Id.*, page 56.
[46]*Id.*, page 73.
[47]This affirmative duty in appellate review under the Army system through the Articles of War to protect the accused is almost wholly foreign to the civil tribunals.

The above discussion has been concerned with the form of the allegation of the facts constituting the alleged misconduct of the accused. The rules for the establishment of the alleged facts to the court-martial are tied to safe standards within the public policy pronounced by the Congress through the Articles of War. The 38th Article makes the "rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States," in so far as practicable, the rules to be applied by the courts-martial, "Provided, that nothing contrary to or inconsistent with these articles shall be so prescribed" by the President under his rule making power.[48] The 37th Article is the Article which controls procedure, and appears as the one within the policy of which nothing inconsistent must be done. The caution of the 38th Article is only to assure fairness through the concept of judicial pattern tested by the wisdom of successive ages as the due process of law.

Trial Practices Compared

A brief parallel of the safeguards surrounding the court-martial procedure with the civil practice is helpful at this point. Under the civil practice, the preferring of charges is left exclusively to the prosecutor's unsupervised discretion. It is very well to say that he is subject to impeachment, that the charges must state a cause of action, or even that a grand jury must cooperate or that a committing magistrate must confirm. The concurrence of the grand jury where one exists (now in probably less than one-third of the states), or of the magistrate, has been demonstrated to be pro forma. Attacks upon the charges cannot go beyond their sufficiency upon their face. Only an unskilled draftsman subjects his pleading to successful attack from such a quarter. A peculiar factor of personal interest, not necessarily consistent with his oath-bound duty, begins to confront the district attorney. The opportunity for fame and fortune begins to press upon him as a quasi bribe. Of course we do not condemn the character of civil prosecutors generally or specially—that is not the point. We have seen many persons rise to high places upon the ladder of the prosecution of sensational cases or many prosecutions and convictions. Where the convicting evidence is not objective, there is temptation to assure it. Police third degree methods, and an unobservable degree of machination may be enough to bring the case to trial, and perhaps convict. It must be borne in mind that the civil prosecutor, exercising inde-

[48]Cf. supra Federal Rules of Criminal Procedure.

pendent office, controls, without accountability or check, the whole process from preferring of charges until the case is finally closed. The likelihood of bribes from private sources not to prosecute is not wholly remote nor improbable. The latter type arises on occasion, and is more readily rejectable through character resistance than is the ever present pressure of glory through his public record as a prosecutor.

With the military, none of the invitations to misconduct just described can exist. While it might be possible that the officer who conducts the trial should also have preferred the charges, it is rarely true. It is a disapproved practice. But even if he were the one who preferred the charges, he does not control the decision of whether or not the charges should be brought to trial. Running the ordinary pattern, the charges will be presented to the regimental commander of the accused person. He is wholly independent of the person preferring the charges. He has an interest, but his interest is as the commanding officer of the accused. The accused is one of his men, and it is from his organization that the man will be taken if the trial occurs. The regimental commander's judgment is called for twice under the military procedure. First when the charges are presented to him. True, that at this point he frequently will not have much information either way in regard to the case, but he does have to decide upon further action, and has great power to cause palpably unjustified charges to be withdrawn, and frequently does. If the charges are referred for investigation, they go to an impartial investigator who must examine all of the available evidence in the presence of the accused, and return the charges with his recommendations. The regimental commander again must exercise his judgment by expressing himself on whether the accused should be brought to trial, and how. When the charges go forward, they will be presented to the officer exercising general court-martial jurisdiction, often the division commander. Again we have an authority completely independent of the person preferring the charges, and who has some direct interest in seeing that unfounded charges do not go to trial. Before the division commander exercises his judgment on the question of whether the charges should go to trial, he must have received and studied the opinion of an expert in military law, a lawyer usually also trained in the civil law, his staff judge advocate.[49] The division commander has complete power to reject the charges, or control designation of the court to which they may be referred.

[49]MCM, page 26, *cf.* 10 U. S. C. 1517.

Let us now look at the civil case again. Examples are legion that the best qualified members of the community to understand the complicated, technical machinery and practices of the civil criminal trial do not sit on juries. The better educated, or abler merchants, business men, lawyers, physicians, ministers, educators, etc., are either excluded or excused because they are "too busy" to bother with matters so unimportant to them. With the military, on the other hand, only those whose position and duties demonstrate the highest qualifications for the task are eligible to sit in judgment on the question of guilt. And in the military service, the service upon a court-martial is given first precedence and the highest sense of obligation. With the civil prosecutor reaching, inescapably, for the prestige of conviction, go a superior knowledge and a bag of tricks of the trade unknown to the jurors who pass upon (sometimes the art of the prosecutor) the question of the guilt of the accused. With the military court, the triers of fact are familiar with the procedure and the rules of trial. They are also usually of the organization of the accused, and they should recognize that only when his rights are protected is their interest as officers served. The same is true of any attempts to confuse and mislead, artfully presented by the defense. Let us suppose that in the civil process a panel of the members of the bar was available for jury service, from which thirteen members were designated by higher, impartial authority to serve on the jury without pay: Would the prosecutor (or the defense counsel) profit by the tricks of the trade designed to confuse ignorant jurors and becloud the issues? Would counsel not be compelled to press to the elementary truth for success on either side?

With the court itself, as distinguished from the fact determining feature of the trial, we have a basis for comparison between the civil and the military trial in terms of the protection of the accused. Commonly, the trial judge acts and rules in civil criminal causes only when forced to do so by an affirmative act of the defendant's counsel. The military court stands charged to the Government to affirmatively conduct the trial fairly. It may call for a witness, examine witnesses (perhaps a civil court also has the power, but, if so, it does not know or use it) and, if material prejudice has arisen through whatever cause, as a matter of fairness to the substantial rights of the accused, to raise the matter on its own initiative, and take the proper action thereunder. Perhaps no phase of the whole military procedure so clearly represents the proper balance of the duty of the officer-member of the court to the accused

on the one hand and the government and people on the other, than his inherent duty, as a member of the court-martial, to speak out if the interests of command or the man on trial are improperly jeopardized by any substantial error or misconduct. Because the civil judge sits as an umpire to act only when stimulated by counsel for the defense, on the theory that rights not affirmatively claimed are lost, the accused in the civil courts does not have as full a degree of protection of his innocence as does the accused before the court-martial. Further, the accused before the general court-martial has no hazard of loss of rights through failure of formal objections and exceptions. Nor has he any problem or expense in preparing notice of appeal and record on appeal, or the hazards of motions to dismiss. For time beyond interest, the military trial record has been complete, without cost to the accused, and automatic. In the civil courts of the United States, the defendant hired a reporter at his own expense, and many cases were not reported at all because of their poverty. Since January 20, 1944, provision has been made for verbatim records by an official reporter. But the defendant still has the cost and the burden of proving his innocence on appeal. The verbatim record and allied papers of the military court go up automatically as a brief in behalf of the accused without motion or cost to himself; and, in addition thereto, a carbon copy of the record of trial is made for him without cost whether or not he requests a copy.[50]

Again we note a ground for comparison on basic fairness in seeking the truth. The trial concluded, execution will follow sentence in the civil courts unless the accused, at his own expense, carries an appeal. On the appeal, he will be heard only upon the points of error he affirmatively asserts, and of them only those he did not waive through failure to object on trial, and now presents in the proper, formal pleading. Under the military procedure, the appeal is automatic, without expense, and upon everything in the record. We already have noted the language of Article of War 37 under which the Congress commanded reviewing and confirming authorities to recognize any error which has injuriously affected the substantial rights of the accused, and to take appropriate action for his protection and relief. In all cases before general courts-martial, the record of trial must be examined in the office of The Judge Advocate General.[51] Only if the trial is found to have been conducted fairly and free of any error which injuriously affected the

[50] 10 U. S. C. 1504, 1506, 1517 to 1522 incl., and 1583.
[51] A. W. 50½, 10 U. S. C. 1522.

substantial rights of the accused will the record of trial be held to be legally sufficient to support the findings of guilty and the sentence. The affirmative duty on review to protect the rights of the accused, which is imposed by law, is the reason the accused need not appear by counsel, although he is privileged to be heard by counsel before the reviewing bodies.

In passing, we did not note, by way of comparison, that one of the most outstanding procedural reforms in recent years in the civil courts has been the pre-trial investigation. Nowhere in the civil criminal procedure, is the accused entitled to appear of record in pre-trial action, to have all witnesses against him examined in his presence, and subjected to his cross-examination; and to have compulsory process to compel witnesses in his own behalf to be presented. These he has in the procedure under Article of War 70, and in his company and regimental commanders' theater of action.[52]

Nowhere under the mandate of Congress, through the Articles of War, does the accused have less protection of his rights upon the merits of the case before a court-martial than he does before the federal courts. In many ways his safeguards are far more real and factual. At no point in the military procedure does any person stand to capitalize upon the misfortune or conviction of the accused. This is not always true of the civil criminal prosecution.

The General Court-Martial

When we examine the court-martial we see that every proposed reform applied by responsible authority to improve the administration of criminal justice in civil cases has been anticipated or adopted into the system of military justice. All of those suggestions sum up to the fundamental postulates of simplicity, fairness, and expedition without haste.[53] In the first place all potentiality of personal

[52]Under the pending Federal Rules of Criminal Procedure a pre-trial procedure on a voluntary basis is suggested. See 10 U. S. C. 1542. The protective equivalent of the indictment procedure is secured to the accused before the charges are approved. Thereafter, the Congress has given the soldier the additional protection of the 107th Article, the completeness of which is the substance of a pre-trial hearing. Neither is essential to a due process trial. However, although no initial constitutional right is involved, the possibility of a statutory right is peculiar in tribunals which, like courts-martial, are wholly statutory. See 10 U. S. C. 1579.

[53]When the rules of the American Law Institute and the later pending Federal Rules of Criminal Procedure are examined in integration, one cannot fail to feel that if they are not patterned upon the procedure of the Manual for Courts-Martial the coincidence is even more surprising. Of the pending Federal Rules of Criminal Procedure, the following are the objective and achievement. They *introduce* into the federal civil courts uniformity and simplicity in criminal procedure. A simple form of indictment supplants the

gain or profit is excluded from the preference of charges which must be verified under oath after investigation or knowledge by observation, as well as from all subsequent stages of the cause. The pleadings are non-technical, simple, and devoid of surprise. The purpose of the investigation is to prevent trials where either the evidence is deficient or the purpose of military discipline can be better served by alternative measures under the 104th Article of War.[54] The interest of the commanding officers is to keep their men, whenever possible, on duty with their organization, on the theory that a soldier's place is in the ranks and not in the guardhouse.

The court itself is selected from men of comparatively superior training and ability, and because thereof, more likely to pass on the issues presented impartially. Even where, because of the rapid growth of our war-time Army, many members of the court have not had years of experience in such work, they, nevertheless, carry with them the intensity of the situation and heightened sense of war-time duty. Equipped by training, education, and experience to deal intelligently with the facts under the issues presented, the members of the court-martial are so far superior to the components of civil courts constituted to try criminal causes that the comparison is startling. Indeed, the citizen's conscience may well be shocked at the comparative incompetency of the civil institutions. By the same token, the rules of procedure and evidence controlling the military court are fundamentally superior to those in the civil courts, if simplicity and fairness to both sides are the proper tests.

However, at this point the merit of military justice begins to depreciate in comparison. We have seen that the Congress had commanded that the practice, in part, and the rules of evidence rather largely, of the federal civil courts should control the federal court-martial. These rules, practices, customs and procedures are the subject-matter of professional study. Mastery cannot be gained by a night's gleaning of a manual outline. There can be no assurance of fairness in a procedure controlled by rules of law and judicial tradition unless those rules are applied by those skilled and learned in their nature and use. The public interest is served only

verbose, prolix document couched in the language of Elizabeth vulgarized through the centuries to us. And the indictment is supplanted by the information in less than capital cases—waiver of indictment by the defendant being permitted. The simple motion is substituted for demurrers, pleas in abatement, special pleas in bar and motions to quash. The procedure of removal is simplified, and the novel feature of motion for change of venue is introduced. And these things, long the substance of the military practice, are yet of the future to the civil courts of the United States.

[54]10 U. S. C. 1576.

when there is assurance that the truth will be disclosed. This brings us to the greatest weakness in the court-martial system. The outstanding virtue of the civil criminal trial is the judge. For whatever may be said about him not being a better judge among judges, he is always one trained and skilled in the task he is called upon to perform as a public servant and officer. It is true that the older officers of the line, after many years of court-martial experience, develop a knowledge of the law and procedure of the law military. In none of our federal agencies is there more call for professional skill in the public interest than in the court-martial trial. Qualified experts are needed as trial judge advocate, defense counsel, and ruling members of the court-martial. By analogy, American experience in the judicial process calls for equal professional expertness in knowledge of the law based upon professional training in the personnel of the law officers of the inferior courts-martial.[55] As a matter of course, counsel should be heard by both the reviewing and confirming authorities on the legal sufficiency of the record of trial to support a sentence, the reasonableness of the sentence, and the problem of clemency.[56]

The parallel development of the civil jurisdiction and the established practices of military justice demonstrates that the court-martial system is fundamentally sound and fair in terms of American tradition and development.[57]

[55]A statute would change the requirements, but all could be achieved by administrative action.

[56]The additional time required for this is justified. On matters so important, the inter-office advice now provided by the staff judge advocate should not measure the information assured to the reviewing and confirming authorities. The reviews of the staff judge advocates, in each instance, should comprehend the arguments of counsel presented at the hearings before the reviewing and confirming authorities.

[57]Sound public administration in the public interest requires that general laws vest adequate power in the office. Good and competent men must be chosen from experience to administer them. And they, in turn, must be kept conscious of their obligations as public servants by the duty to make public frequent audits of their administration. See for full discussion of the administrative function and public interest concept, J. B. Smith, Judicial Function in Legislative Bodies, (1941) 27 Va. L. Rev. 417, and Jurisprudence and Constitutional Canon Re "To the State and to Congress," (1941) 28 Va. L. Rev. 129. The effort to find balance between statutory minutiae and general discretion is reflected in the substance of a colloquy which I recall at a hearing of the American Law Institute upon its code provision designed for the latter effect through simplification and elasticity of the indictment process. To the protest by the elder jurist, "I'd hate to be indicted under such a scheme," the Reporter's parody, "I'd hate to be indicted under any plan," silenced his alarm.